case of *Lau Tin Sye* v. *Yusuf bin Muhammad*[6]. Special rules apply to the position of those who come as invitees upon premises. And the cause of action based on invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage) but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger [per Lord Wright in *Glasgow Corporation* v. *Muir*[7]].

Applying this to that part of the judgment of the learned judge where he purported to expound the law governing the relationship of an invitor and invitee, it is plain that the learned judge erred in stating the law wider than that laid down in *Indermaur* v. *Dames* and purported to place the duty on the appellants on a much wider basis than is there postulated. In other words, the learned judge would impose on the appellants a degree of care higher than the law exacts. In our opinion, a dangerous situation *per se* does not constitute "unusual" danger or risk.

The invitor's duty is confined to protection against "unusual" dangers and in *London Graving Dock Co. Ltd.* v. *Horton*[8] the House of Lords ruled that an "unusual" risk is one which is not usually found in carrying out the task which the invitee has in hand. In the Court below, the learned judge did not deal with the issue of "unusual" danger in his judgment as this had not been pleaded by the respondents in their statement of claim. However, on the facts found by the learned judge, we do not think the act of raising the forklift mechanically and using 2 rubber tree stumps to support the heavy horizontal iron bar, amounted to "unusual" risk. If this were so the respondents would have pleaded it in their reply. In our opinion, these facts might constitute "incidental or usual" danger which could reasonably be foreseen, by the deceased in the course of his employment.

In *Horton's case* Lord Normand said at page 751:

"The occupier has no duty to the invitee unless there is unusual danger which he knew or ought to have known ..."

And at page 758 Lord Oaksey in the same case observed:

"An occupier owes no duty to an invitee in respect of "usual" dangers since the invitee is only entitled to expect that the invitor will take care to prevent damage from "unusual" danger; ..."

The onus of pleading and proving "unusual" danger which the appellants knew or ought to have known, rests on the respondents and since they had failed to establish it, the appellants owed no duty of care to the deceased. Much as we sympathise with the dependants of the deceased, we have no alternative but to set aside the judgment of the Court below. The appeal is therefore allowed with costs here and below. The $500.00 deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *B.G. Martin & Co.; Shearn, Delamore & Co.*

MERSING OMNIBUS CO. SDN. BHD. v. MINISTER OF LABOUR AND MANPOWER & ANOR.

[F.C. (Raja Azlan Shah L.P., Abdul Hamid & Abdoolcader F.JJ.) March 31, 1983.]

[Kuala Lumpur – Federal Court Civil Appeal No. 203 of 1982]

Administrative Law – Decision of Minister of Labour and Manpower that company extend recognition to a Union – Application for certiorari – Application made after six weeks of the date of decision – No application for extension of time – Court has no jurisdiction to grant leave to apply for certiorari – R.H.C. 1980, 0.3 r. 2(2), 0.53 rr. 1 & 1A. – Industrial Relations Act, 1967, s. 9(5) – Courts of Judicature Act, 1964, Schedule para 1.

Practice and procedure – Application for certiorari – Application made out of time – No application for extension of time – Court has no jurisdiction to grant leave – R.H.C. 1980, O. 3 r.2(2) & O. 53 rr. 1 & 1A.

In this case the Minister of Labour had given his decision that the appellant extend recognition to the second respondent for the categories of employees stipulated therein. The decision was given on the November 23, 1981. On January 9, 1982 the appellant sought leave to apply for *certiorari* to quash the decision of the Minister. Leave was granted but subsequently on the substantive application for *certiorari*, the application was dismissed. The appellant appealed. Order 53, rule 1A of the Rules of the High Court, 1980, provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application was made.

In this case the application for leave was made after the period of six weeks from the decision of the Minister and no application for extension of time was made nor was the delay accounted for.

Held: The appellant was out of time and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge and therefore leave should not have been granted to the appellant to apply for *certiorari* and the learned Judge had no jurisdiction to do so.

Cases referred to

(1) *Secretary of State for Defence* v. *Warn* [1970] A. C. 394, 402.
(2) *Pahang South Union Omnibus Co. Bhd.* v. *Minister of Labour and Manpower & Anor* [1981] 2 M.L.J. 199, 204.
(3) *Federal Hotel Sdn. Bhd.* v. *National Union of Hotel, Bar and Restaurant Workers* [1983] 1 M.L.J 175, 178.
(4) *Merdeka University Berhad* v. *Government of Malaysia* [1981] 2 M.L.J. 356, 362.
(5) *Griffiths & Anor* v. *Secretary of State for the Environment & Anor* [1983] 2 W.L.R. 172, 188.

FEDERAL COURT.

S. Kulasegaran for the appellant.

Dato Abu Mansor bin Ali, Senior Federal Counsel, for the 1st respondent.

B. Lobo for the 2nd respondent.

Cur. Adv. Vult.

Abdoolcader F.J. (delivering the judgment of the Court): A trade union recognition dispute between the appellant and the second respondent was referred to the first respondent, the Minister of Labour and Manpower, who gave his decision on November 23, 1981 in Form D as prescribed by the Industrial Relations Regulations, 1980 that the appellant extend recognition to the second respondent as from June 22, 1981 for the categories of employees stipulated therein. The appellant by an *ex parte* motion taken out on January 9, 1982 sought leave to apply for *certiorari* to quash this decision of the Minister 'made under section 9(5) of the Industrial Relations Act, 1967 and dated the 23rd day of November, 1981'. Leave was granted accordingly by an order made by Hashim Yeop A. Sani J. on February 5, 1982 whereupon the appellant applied by a substantive motion *inter partes* on February 17, 1982 for *certiorari.* The learned Judge heard the application and dismissed it on July 29, 1982 *a quo* the appellant lodged an appeal to this court.

At the outset of the hearing of this appeal we raised the question of the appellant being out of time in his application for leave for *certiorari* in the light of the provisions of Order 53 rule 1A of the Rules High Court, 1980, the relevant part of which specifically provides that leave shall not be granted to apply for an order of *certiorari* unless the application for leave is made within six weeks after the date of the proceeding or the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made. As the decision of the Minister sought to be impugned is dated November 23, 1981, the period of six weeks would, on a computation under Order 3 rule 2(2) of the Rules of the High Court, expire on January 5, 1982, and as the application for leave was made on January 9, 1982 the appellant was clearly out of time and no extension of time was sought nor the delay accounted for to the satisfaction of the learned Judge who heard the application as required by the rule. Apparently this point completely escaped all parties involved, as a result perhaps of an affliction of incorrigible somnolence that seems to pervade the perception of the law and practice of the profession from time to time. We took the point ourselves as it clearly goes to the jurisdiction of the court from which leave to apply for *certiorari* was sought as Order 53 rule1(1) stipulates that no application for an order of *certiorari* shall be made unless leave therefor has been granted and rule 1A which we have already adverted to enacts that leave shall not be granted except in accordance with its specific provisions.

Lord Hodson said in his judgment in *Secretary of State for Defence* v. *Warn*[1] (at page 402): "Procedural sections are usually mandatory and there is nothing which points to the contrary in this case". In the matter before us the terms of Order 53 rules 1 and 1A clearly reflect the imperative requirements which must be complied with before an application for *certiorari* can be made. Power in the High Court in regard to *certiorari* is provided for in the Courts of Judicature Act, 1964 in paragraph 1 of the Schedule thereto which sets out the additional powers of the High Court referred to in section 25(2) of the Act but the proviso to section 25 specifically enacts that all such powers of the High Court in the exercise of its jurisdiction as are referred to therein shall be exercised in accordance with any written law or rules of court relating to the same [*Pahang South Union Omnibus Co. Bhd.* v. *Minister of Labour and Manpower & Anor.*[2] (at page 204)]. We should perhaps mention that when we first put the point in question to counsel for the respondents for their views, both of them

somewhat half-heartedly indicated they were taking no objection on this aspect, presumably because it had never occurred to them before, and that they were prepared to waive non-compliance with the provisions of Order 53 rule 1A if there was any; but after an overnight adjournment granted at the request of counsel for the appellant, counsel for both respondents resiled and changed their stance and now said that the appellant was indeed time-barred and in breach of the rule, with Senior Federal Counsel appearing for the Minister stating that this was the result of one night's research, though we did not have the benefit of sharing in the fruits of his research. In any event jurisdiction does not originate in the consent of the parties and cannot be established, where it is absent, by such consent or acquiescence [*Federal Hotel Sdn. Bhd.* v. *National Union of Hotel, Bar & Restaurant Workers*[3] (at page 178)].

We have earlier stated that the decision of the Minister is dated November 23, 1981. Mr. Kulasegaran for the appellant concedes that if time runs from that date then the appellant was out of time but he contends that time should only run from the date the appellant received the Minister's decision and had cognizance thereof which was November 28, 1981 and that the appellant was accordingly within time in making its application for leave. He submits that when the Minister gives his decision under section 9(5) of the Industrial Relations Act this presupposes a communication of his decision and that the date of the Minister's decision must therefore be the date when it is in fact communicated to the parties. We find no merit in this contention in the face of the explicit provisions of Order 53 rule 1A which refer to 'the date of the proceeding'. He referred in argument by way of analogy, as he put it, to the provisions of Order 42 of the Rules of the High Court which have no relevance whatsoever to the issue under consideration. He would have done better to have referred to Order 55 rule 13 which provides for an appeal to the High Court from a decision of any person or body of persons under any written law and sub-rule (2) thereof which declares that unless otherwise provided by any written law, such appeal shall be made within one month from the date on which the decision was given or the date on which such decision was notified to the person appealing, whichever is the later date. There is in that sub-rule an express provision on the lines of Mr. Kulasegaran's argument in stark contrast to the explicit phraseology in Order 53 rule 1A which only refers to the date of the proceeding.

The validity of Mr. Kulasegaran's contention must be tested by considering the consequences to which it would lead. Invariably and *ex necessitate rei* a decision of the Minister under section 9(5) of the Industrial Relations Act and other categories of administrative decisions affect two or more and perhaps a multiplicity of parties. In a matter such as the instant one there will at least be the employer and the trade union claiming recognition and in other cases there might well be several others involved as well. In this event, it would be virtually impracticable and well-high impossible to ascertain a settled and agreed date of communication of a decision as this would vary from party to party according to when it received notification of the decision. This would entail attributing different dates of the decision for different persons and *ipso facto* manifest the extreme improbability of the Rules Committee having intended that the date of the proceeding for the purposes of Order 53 rule 1A should be determined by the date on which notice is severally given to a multiplicity of parties and thereby providing in effect different periods of time for different parties for the purposes of applying for leave for *certiorari*. The ensuing result of the appellant's contention as to manifold and differing dates of a proceeding within the meaning of Order 53 rule 1A where a multiplicity of parties are involved would give the term in question in the rule a somewhat chimeric connotation of a monstrosity with a lion's body, a goat's head and a serpent's tail and perhaps even a variety of other assorted appendages, and indeed be reminiscent and suggestive of the saga of the six sightless sages who on encountering a pachyderm severally felt different parts of its body and then declared vastly differing descriptions of the beast. An analogue to this sort of situation was considered and an appropriate rejoinder administered in *Merdeka University Berhad* v. *Government of Malaysia*[4] (at page 362). Furthermore the appellant in its application for leave and the substantive motion for *certiorari* and in the title of the proceedings instituted specifically refers to 'the decision of the Minister dated November 23, 1981'. In an application for *certiorari* it is essential to specify the particular order or decision made and sought to be quashed.

Order 53 rule 1A is textually adopted *totidem verbis* (except for the period specified) from Order 53 rule 2(2) of the English Rules of the Supreme Court prior to its amendment in 1977, and in an annotation thereto in Volume 1 of the 1976 *Supreme Court Practice* (at page 801) it is speci-

fically stated that the period of time stipulated in the rule after the date of the proceeding in an application for leave for *certiorari* runs from the date of the order sought to be removed. The propriety of this construction is reinforced by rule 4 of the new English Order 53 for application for judicial review introduced in 1977 which provides for an application to be made promptly and in any event within three months from the date when grounds for the application first arose and then goes on in sub-rule (2) thereof to define where the relief sought is an order of *certiorari* the date when grounds for the application first arose as the date of the judgment, order, conviction or proceeding.

It is abundantly clear that the date of the proceeding in the matter before us for the purposes of Order 53 rule 1A is *ex visceribus verborum* the date of the Minister's decision set out in Form D, scilicet, November 23, 1981. The very point we have taken was considered and discussed some two months ago in *Griffiths & Anor.* v. *Secretary of State for the Environment & Anor.*[5] in which the House of Lords held that when the Secretary of State gave a decision on an appeal under the Town and Country Planning Act, 1971 against a refusal of planning permission, the six weeks provided for in that Act for making an application to the High Court to quash the order on certain limited grounds ran from the date when the decision was made and not from the date when notice of it was received by the aggrieved person and that the decision was made on the date stamped on the decision letter. Lord Bridge of Harwich in his opinion in that case said (at page 188):

"When a letter recording a decision of the Secretary of State made 'hereby' has been typed, signed on behalf of the Secretary of State and date-stamped, it seems to me that the process of decision making is complete and that the letter itself is not the less a decision of the Secretary of State because it is still in his power to revoke it".

The decision of the Minister in the instant appeal is embodied in Form D prescribed in the Industrial Relations Regulations, 1980 which records his decision made 'hereby' and was typed and signed by him and dated November 23, 1981. The process of decision making by the Minister was then complete and his decision was accordingly given on that date – November 23, 1981.

The appellant was as a result without the time prescribed in Order 53 rule 1A and neither sought an extension of time nor accounted for the delay to the satisfaction of the learned Judge within its explicit requirements. Leave should not therefore have been granted to the appellant to apply for *certiorari* and the learned Judge had no jurisdiction to do so. On this ground we dismissed the appeal before us with costs and directed the deposit lodged in court by way of security to be paid out to the respondents.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Lobo & Associates.*

DIRECTOR-GENERAL OF INLAND REVENUE v. EUROMEDICAL INDUSTRIES LTD.

[F.C. (Wan Suleiman, Abdul Hamid & Mohamed Azmi F.JJ.) October 20, 1982 & April 2, 1983]

[Kuala Lumpur – Federal Court Civil Appeal No. 17 of 1981]

Revenue Law – Management fees paid to a company resident in United Kingdom with no permanent establishment in Malaysia – Payments within definition of "royalty" in Income Tax Act but not within definition in Double Tax Relief (United Kingdom) Order – Whether payments liable to Tax – Double Tax Relief (United Kingdom) Order, 1973, Articles VI and XI – Income Tax Act, 1967, ss. 2,4 and 132.

In this case the respondents, a company resident in the United Kingdom and with no permanent establishment in Malaysia entered into an agreement with a Malaysian company for the purpose of manufacturing catheters. The respondents were to provide managerial, planning, training, technical, operational, marketing and development services to the Malaysian company. The Malaysian company paid management fees to the respondents. The Director-General of Inland Revenue treated these payments as royalty within the definition of section 2 of the Income Tax Act, 1967, and accordingly made assessments against the respondents under section 4(d) of the Income Tax Act. The respondents appealed. The question for determination by the High Court was whether the assessments were correctly made having regard to the Double Taxation Relief (United Kingdom) Order 1973 and section 4 of the Income Tax Act, 1967. It was common around that the payments were management fees which were paid to a company resident in the United Kingdom with no permanent establishment in Malaysia. It was also agreed that the payments would come within the definition of "royalty" under section 2 of the Act but not within the definition in Clause 3 of Article XI of the Relief Order. Vohrah J. in the High Court decided that the provisions of the Relief Order would override those in the Income Tax Act. He held that the fees should be treated as income or profits and since the respondents did not carry on business in Malaysia through a permanent establishment in Malaysia, there was no legal basis for the Director-General to charge income tax under section 4 of the In-